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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* CITY OF AUSTIN, TEXAS; TRAVIS COUNTY, TEXAS; AMERICAN SOCIETY FOR THE PROTECTION OF NATURE IN ISRAEL; ENVIRONMENTAL DEFENSE FUND, INC.; NATIONAL WILDLIFE FEDERATION; WORLD WILDLIFE FUND; SIERRA CLUB; AND FUNDACION NATURA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The City of Austin, Texas; County of Travis, Texas; American Society for the Protection of Nature in Israel ("ASPNI"); Environmental Defense Fund, Inc. ("EDF"); National Wildlife Federation ("NWF"); World Wildlife Fund ("WWF"); Sierra Club; and Fundación Natura submit this brief in support of the Respondents Defenders of Wildlife, et al.[1]

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[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

The City of Austin is a home rule municipality and political subdivision of the State of Texas. Austin's metropolitan area provides habitat for federally listed endangered species. The City of Austin has been participating in efforts to formulate a regional habitat conservation plan for the past several years. Austin's interest in the protection of endangered species is not limited to the central Texas area, since some of the species it is trying to conserve migrate in the winter to Central America.

Travis County is a duly constituted county and political subdivision of the State of Texas. Travis County's geographical area provides habitat for federally listed endangered species. The County of Travis has been participating in efforts to formulate a regional habitat conservation plan for the past several years. Travis County's interest in the protection of endangered species is not limited to the central Texas area for the same reason the City of Austin's is not.

ASPNI is dedicated to increasing the American public's awareness and support of the critical environmental work being conducted in Israel by the Society for the Protection of Nature in Israel ("SPNI"). Since 1953, SPNI has been the leader of efforts to preserve Israel's natural heritage. Because Israel's geographic location is at the crossroads of Asia, Africa, and Europe, it has been endowed with an unusual variety of plant and animal species. ASPNI and SPNI are dedicated to the protection of Israel's wealth of animal and plant species such as the Great Griffin vultures, tiny sunbirds, gazelles, ibex, and wildflowers.

EDF is a national nonprofit membership organization dedicated to finding scientifically sound and economically viable solutions to environmental problems. Among the problems to which EDF has devoted substantial resources is the accelerating endangerment and loss of species in the United States and elsewhere. EDF's members use and enjoy the living wild resources of the United States and

elsewhere for scientific study, aesthetic appreciation, recreation, and for their historic, cultural, ecological, scientific, and educational value.

NWF is the nation's largest, not-for-profit conservation education organization dedicated to the wise management of the natural resources of the world, including wildlife. To that end, NWF's staff has worked since 1936 at the international, national, regional, and local level to encourage the protection and preservation of endangered and threatened species.

WWF is the largest private U.S. organization working worldwide to conserve nature. WWF works to preserve diversity and abundance of life on earth and the health of ecological systems by protecting natural areas and wildlife populations, promoting sustainable use of natural resources, and promoting more efficient resource and energy use and the maximum reduction of pollution.

The Sierra Club is a national nonprofit organization dedicated to enhancing and protecting the natural resources and human environment of the earth. The Sierra Club's concerns encompass the protection of global biodiversity and the protection of threatened and endangered species. The Club's vital interest in this case stems from its longstanding and continuing efforts to ensure proper interpretation and enforcement of the Endangered Species Act.

Fundación Natura is a private, nonprofit organization working to promote environmental conservation in Ecuador, including wildlife. Because the United States government authorizes or funds different projects in Ecuador, Fundación Natura views the Section 7 consultation process of the Endangered Species Act as a useful instrument to assist in its conservation effort.

STATEMENT OF FACTS

Amici curiae adopt by reference the Statement of Facts set forth in the Brief for the Respondent Defenders of Wildlife filed with this Court.

SUMMARY OF ARGUMENT

Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(1) & (2), by requiring federal agencies to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species, provides one of the most effective available safeguards against the destruction and elimination of wildlife. The Endangered Species Act and its antecedents, with their frequent references to international wildlife and the need to protect *all* endangered species, illustrate the commitment on the part of the United States to protect and preserve the wildlife of the world.

This commitment has now been weakened by the Secretary of the Interior's 1986 rule which eliminates the Endangered Species Act's requirement that a U.S. agency approving or funding a project or action abroad must insure that such action is not likely to jeopardize endangered species. The revised rule stands in stark contrast to the plain language of the Endangered Species Act, its legislative history, and subsequent administrative actions and legislative amendments to the Act.

ARGUMENT

I. THE APPLICATION OF SECTION 7 OF THE ENDANGERED SPECIES ACT TO FEDERAL ACTIONS AT HOME AND ABROAD IS NECESSARY TO IMPLEMENT THE ACT'S PURPOSES AND TO PREVENT ADVERSE EFFECTS TO ENDANGERED SPECIES WITHIN AND WITHOUT THE UNITED STATES

Human activities are causing a dramatically accelerating loss of plant and animal species throughout the world. Habitat loss, as a result of rapidly increasing development, is the primary cause of a swelling tide of extinction. The purpose of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, quite simply, is to turn that tide.

"The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*." *TVA v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

While the Act cannot prevent all species extinctions occurring today, it is within the Act's power to prevent those that might occur as the result of actions of the federal government. In 1973, through Section 7 of the Endangered Species Act, Congress prescribed a very simple, yet fundamental, rule: henceforth, the federal government would no longer knowingly be the agent of any species' destruction. Instead, "[e]ach Federal agency shall . . . insure that any action authorized, funded or carried out by [it] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

In the case now before this Court, the government argues that Congress meant something less than what it clearly said (Petitioner's Brief ("Pet. Br."), pp. 31-35). The government urges that the duty imposed by Section 7, though unlimited on its face, should be given a limited geographic scope; specifically, it should be interpreted to apply only to the actions of federal agencies carried out within our own national borders or on the high seas (Pet. Br., pp. 43-45). Federal activities within foreign nations, the government argues, should be beyond the scope of Section 7 (Pet. Br., pp. 45-49). In another country, federal agencies should be free to do what they cannot do here—authorize, fund, or carry out activities that extinguish an entire, unique species of life. Such a result is plainly contrary to the purposes, language, and legislative history of the Act. As this Court explained in *Hill*, "the language, history, and structure of the legislation . . . indicate[] beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. at 174.

The duty of federal agencies to insure that their actions not jeopardize the survival of any endangered species is aided by a series of procedures designed to inform an agency of the likely consequences of its planned actions. Under Section 7, an agency proposing to take an action must inquire of the Secretary of the Interior whether any threatened or endangered species "may be present in the area of the proposed action." 16 U.S.C. § 1536(c)(1). If the Secretary responds that one or more such species may be present, then the agency must prepare a "biological assessment" to determine whether any such species is "likely to be affected" by the action. *Id.* If the agency determines that such an effect is likely, it must formally consult with the Secretary, who must prepare a written biological opinion "detailing how the agency action affects the species or its critical habitat."[2] 16 U.S.C. § 1536(b)(3)(A).

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[2] Agencies must review their actions by preparing a biological assessment to determine if there are, in fact, listed species present in the "action area" that may be adversely affected. 50 C.F.R. § 402.12(k). "The biological assessment shall be completed before any contract for construction is entered into and before construction is begun." 50 C.F.R. § 402.12(b)(2). This requirement that agencies review their activities and prepare biological assessments before even entering into contracts for construction promotes informed decision making and provides substantial protection to listed species.

At the very moment it is determined that consultation is required, a second level of "benefit" is conferred on parties interested in preserving listed species because, under the Act, each federal agency is prohibited from irreversibly or irretrievably committing any resources to an action that forecloses the implementation of alternative measures which might allow the agency action to go forward without jeopardizing listed species. 16 U.S.C. § 1536(d). An agency that ignores the prohibition on resource commitment, or one that continues work on a project while preparing a biological assessment, is no longer eligible for an exemption from the consultation process. 16 U.S.C. § 1536(h)(1)(A)(iv).

Thus, federal agencies are obligated to do a preliminary review of their projects and a biological assessment to determine whether formal consultation is necessary, they are obligated to initiate

Whenever in his biological opinion the Secretary concludes that a proposed federal action is likely to jeopardize the continued existence of a listed species, he must suggest "those reasonable and prudent alternatives which he believes would not violate" the prohibition against jeopardy. *Id.* As a result of these careful processes, designed to provide federal agencies with the best available information about the effects of their planned actions on listed species, as well as alternatives to avoid unacceptable effects, Section 7 has historically been quite successful in preventing the loss of species without significant disruption of federal activities.[3]

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formal consultation where listed species may be affected, and they are obligated to immediately alter their actions to avoid an irretrievable commitment of resources at the beginning of the consultation process. These elements combine to confer an immediate benefit to threatened and endangered species even before formal consultation has been instigated.

[3] In San Jose, California, developers of a landfill which was subject to the consultation process agreed to a number of mitigation measures to offset the project's impact on the Bay checkerspot butterfly; those mitigation measures included a conservation trust fund, ongoing research, habitat acquisition and management, restoration and revegetation when the landfill reached its capacity, and off-site reintroduction and recovery for the butterfly. Authorization for the project was granted, but with mitigation measures which assured the butterfly's continued existence. In Florida, several marina projects on the intracoastal waterway posed potential impacts on the West Indian manatee. The biological opinion issued as a result of the consultation process prescribed a number of measures, which were adopted, to significantly lessen the impact on the animal. These measures were not intrusive, but by limiting the number of powerboat slips, reducing boat speed limits, and conditioning slip rental agreements, interference with the manatee's habitat was significantly limited. S. Yaffee, "Avoiding Endangered Species/Development Conflicts Through Interagency Consultation," in *Balancing on the Brink of Extinction* (K. Kohm, ed., 1991), at 89. *See Endangered Species Act Reauthorization: Hearing on H.R. 1476 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 275 (1987) (prepared statement of J. Scott Feierabend, Director, Fisheries and Wildlife Division, National Wildlife Federation).

In addition to suggesting a limitation that does not appear on the face of Section 7, the government fails to acknowledge that although the federal activities at issue here may occur within foreign nations, the effects of those activities can be, and often are, felt within the United States. One dramatic example concerns two of the *amici* here. The area of Travis County, Texas around Austin is the principal breeding range of an endangered migratory bird, the golden-cheeked warbler. The bird occurs there in the spring and summer months; in the autumn it migrates south to Guatemala and adjacent areas. Land use in Austin and elsewhere in Travis County must be carefully controlled to ensure that no "taking" of the bird occurs incidental to development there. To guarantee its compliance with this requirement, the City and County have been engaged in a lengthy and expensive effort to develop a "habitat conservation plan" upon which to base an application for an "incidental taking permit" under Section 10(a)(1)(B) of the Endangered Species Act. 16 U.S.C. § 1539(a)(1)(B).

Meanwhile, federally funded activities in Guatemala, such as a major pesticide spraying program underwritten by the U.S. Animal and Plant Health Inspection Service ("APHIS"), may adversely affect the warbler in its winter range. Under the government's interpretation of Section 7, APHIS need not consult with the Secretary of the Interior concerning the effects of this massive pesticide spraying program, and it has not done so. *See*, Addendum, Letter to Michael J. Bean from U.S. Department of Agriculture. As a result of this and other activities carried out by federal agencies in foreign countries, the substantial conservation investments being made in the United States by Travis County and Austin under the mandate of the Endangered Species Act could be rendered worthless.

The golden-cheeked warbler is not the only migratory species protected by the Endangered Species Act. There

are many others, including the whooping crane, roseate tern, Kirtland's warbler, peregrine falcon, piping plover, black-capped vireo, gray whale, humpback whale, Kemp's ridley sea turtle, and others. All of these species regularly spend part of their lives in the United States or its waters and another part in foreign countries or waters. While these species are in the United States, federal agencies and private citizens alike are under stringent duties to ensure their effective conservation. When the same animals migrate into the territory of another country, however, the government argues that federal agencies are free to do whatever they please, regardless of its impact upon these species and upon efforts in the United States to conserve them. Indeed, in the government's remarkable view, federal agencies do not even have a duty to ascertain the likely impacts of their actions on these species.

Beyond migratory species, there is yet another group of threatened or endangered species for which federal activities in foreign countries can have important effects within the United States. These are non-migratory species that occur in both the United States and foreign countries. Examples include the West Indian manatee, American crocodile, desert pupfish, least Bell's vireo, Sonoran pronghorn antelope, Everglades kite, and many others. To the extent that federal agency activities outside our borders reduce the numbers or range of a species that also occurs within the United States, the task of avoiding the extinction of that same species will fall even more heavily upon U.S. landowners, local governments, and others here. In some cases, species that once occurred in the wild in the United States no longer do, but they survive in foreign countries. Examples include the Mexican wolf and the ivory-billed woodpecker. Recovery of such species and restoration to their former habitats in the United States thus may depend entirely upon assuring their survival in those foreign countries. If federal government agencies are free to disregard Section 7, their

actions abroad can render impossible any prospect for the recovery of such species in the United States.

From all of the above examples, it is plain that the effects of the regulations at issue here are not limited to foreign countries. They can and will be felt here as well. Moreover, even with respect to species that never occur in the United States, their loss can have important effects here. Foreign species are the original source of many important medicines, such as vincristine and vinblastine, derived from the rosy periwinkle of Madagascar and used in the treatment of Hodgkins' disease. The President's recent heart ailment was treated with digoxin, a drug derived from Grecian foxglove, a native of central and southern Europe. Other similar examples are legion. *See* N. Meyers, *A Wealth of Wild Species: Storehouse for Human Welfare* (1983). American agriculture is similarly dependent upon preserving wild species elsewhere. Wheat, rice, potatoes, and other important American crops are not native to this country; to improve their resistance to pests, disease, drought, and other stresses, they require regular improvements through crossbreeding with genetically related wild plants typically found in regions of the world in which these crops originated. *Id.* at 27-42. Thus, the loss of species in distant lands can impair agricultural productivity and the prospects for medical advances here at home.

For all of these reasons, it is clear that although the federal activities at issue in this case take place in foreign countries, their effects are likely to be felt here. The purpose of the Endangered Species Act, to stem the tide of extinctions so that we can continue to enjoy the enormous benefits of biological diversity, would be seriously undermined by the interpretation of Section 7 that the government advances here. That interpretation should not be embraced; the plain language of the Act, its legislative history, and the very purpose and structure of the Act all require that the government's interpretation be rejected.

II. THE SECRETARY'S EXEMPTION OF FOREIGN ACTIONS FROM THE ENDANGERED SPECIES ACT'S CONSULTATION REQUIREMENT IS INCONSISTENT WITH CONGRESS' INTENT TO CREATE AN EFFECTIVE PROCEDURE FOR PROTECTING *ANY* ENDANGERED AND THREATENED SPECIES

The plain statutory language of "*any* action" and "*any* endangered species or threatened species" demonstrates Congress' intent to create a statute with international application. As demonstrated below, the Secretary's revised 1986 rule which eliminates the consultation requirement for federal actions occurring on foreign soil is inconsistent with the plain language and legislative history of the Act.

A. The Plain Language, Structure, and Purpose of the Endangered Species Act Mandate That the Consultation Process Occur Even When the Action Takes Place on Foreign Soil

The starting point for any statutory analysis must be the language of the statute itself. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). When the language of a statute is clear, it is that language which conclusively determines its applicability. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). This Court has recognized the clarity of the Endangered Species Act's language: "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. . . . This language admits of no exception." *TVA v. Hill*, 437 U.S. at 173.

Congressional intent to have the consultation process applicable to foreign actions is reflected in the plain language of Sections 4 and 7 of the Endangered Species Act. As stated above, consultation is mandated whenever *any* agency action may jeopardize *any* endangered species; since such species exist in large measure abroad, as Con-

gress well knew, a plain reading of the statute requires that the consultation process apply to agency actions which occur overseas.

In addition, the interplay between Sections 4 and 7 manifests Congress' intent that actions overseas be subject to the consultation requirement of Section 7(a)(2). This relationship is apparent upon examination of Sections 4 and 7. Section 4 requires the Secretary to list species as threatened or endangered, including those that occur in whole or in part outside the United States. Under Section 4(b):

> (1)(A) The Secretary shall make determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, . . . to protect such species . . . .
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been—
>
> (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement*; or
>
> (ii) identified as in danger of extinction . . . by any State agency or by any agency of a *foreign nation* that is responsible for . . . conservation . . . .

16 U.S.C. § 1533(b) (emphasis added). Section 4 also requires that the Secretary provide notice to countries in which listed species occur.[4] Almost half of all species so

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[4] "[T]he Secretary shall . . . insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each *foreign nation* in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon." 16 U.S.C. § 1533(b)(5)(B) (emphasis added).

designated have been foreign to the United States.[5] 50 C.F.R. § 17.11.

The government insists that there must be a "clear statement" of Congressional intent before a statute is given extraterritorial application, and it disparages the decision of the Court of Appeals because that court found evidence of that intent in *other* (*i.e.*, non-Section 7) provisions of the Act. The Department of the Interior, however, itself interprets Section 7 as having extraterritorial effect on the high seas, and it premises that interpretation on *other* provisions of the Act (*i.e.*, Section 9). Section 9's restrictions on taking, which the Department of the Interior says justify the extension of Section 7 to the high seas, have their parallel in Section 9's restrictions on foreign commerce, which offer at least as much justification for extending Section 7 to foreign countries.

The Secretary's interpretation of the Act leads to the absurd result that species dwelling both in the United States and other nations and listed by the Secretary as endangered are not afforded full protection. While the governments of the nations in which a particular species occurs are notified of a proposal to list it as endangered or threatened, thereafter agencies of the United States can proceed with actions abroad that jeopardize its existence without so much as consulting with the wildlife experts at the Department of the Interior. On the other hand, the very same species also dwelling in the United States must be protected. The golden-cheeked warblers that migrate between Guatemala and Texas illustrate the absurdity of an uneven application of Section 7. While

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[5] As of May 31, 1991, 522 listed species (of a total of 1137) occur exclusively in foreign countries. A large percentage of the remaining species are migratory or have ranges that extend beyond the United States. U.S. Fish and Wildlife Service, Endangered Species Technical Bulletin, Vol. XVI, No. 6, June 1991, p. 12. Thus, the government's interpretation reads nearly half of all listed species out of Section 7's consultation process, despite the plain language of Section 7 referring to *any* listed species.

in Texas, the birds receive legal protection from the federal government, including protection provided by the threat of criminal prosecution against violators of the Act. Upon leaving the U.S., however, the birds are imperiled by that same government which supports actions destroying their habitat and food sources.

Other provisions and sections of the Act confirm Congress' concern with the international nature of the endangered species problem. Section 1(a) of the Act, the "Congressional findings and declaration of purposes and policy," includes the statement:

> the United States has pledged itself as a sovereign state in the *international community* to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction . . . .

16 U.S.C. § 1531(a)(4) (emphasis added).[6] In this, in other declared findings and policies, and throughout the Act, Congress makes no distinction between foreign and domestic listed species.

Nothing in the exemption provision of Section 7(e)-(p), 16 U.S.C. § 1536(e)-(p), implies a domestic limitation to the consultation provision of Section 7(a)(2). In fact, segments of the exemption procedure clearly contemplate actions abroad. Section 7(g)(1) provides that "the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption . . . ." 16 U.S.C. § 1536(g)(1). Agency actions that will not occur in any state are agency actions abroad, unless plain meaning is to be stretched to the breaking point. Subsection (i), providing for review of agency actions by the Secretary of State in order to grant exemptions where compliance with the Act's provisions

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[6] This pledge was made pursuant to numerous international agreements including: migratory bird treaties with Canada, Mexico, and Japan; the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Western Convention); and the Convention on International Trade in Endangered Species. 16 U.S.C. § 1531(a)(4).

"would be in violation of any international treaty obligation or other international obligation of the United States," further illustrates that consultation obligations extend to foreign actions. 16 U.S.C. § 1536(i). Subsection (j) allows the Secretary of Defense to secure an exemption from Section 7 for any agency action if "necessary for reasons of national security." 16 U.S.C. § 1536(j). Many such obvious national security actions could take place outside U.S. borders.[7]

Section 7(n)(2), which provides for judicial review of an exemption decision by the Endangered Species Committee, requires suit to be filed in the U.S. Court of Appeals for the District of Columbia Circuit "in any case in which the agency action will be or is being, carried out *outside of any circuit* . . . ." 16 U.S.C. § 1536(n)(2) (emphasis added). Thus, Congress clearly contemplated that actions subject to Section 7 consultation might occur outside the United States and its territories, all of which are part of one or another of the judicial circuits. Moreover, had Congress intended by this language to cover only actions on the high seas, it would have expressly used the phrase "high seas" as it did elsewhere in the Act, *see, e.g.*, 16 U.S.C. § 1538(a)(1)(C), rather than referring to actions "outside of any circuit."

The Secretary's interpretation of the Act attempts narrowly to circumscribe the international reach of the Act by citing Section 8, entitled "International Cooperation," as evidence that the Act's specific provisions are either domestic *or* international, but not both (Pet. Br., pp. 39-40). This categorization is not persuasive. Section 8(b) requires that the Secretary of State encourage "foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and

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[7] The floor debate concerning this provision reveals that Congress was in fact concerned about waging war, including the launching of intercontinental ballistic missiles. *See* 124 Cong. Rec. 21,592-93 (1978).

threatened species listed pursuant to section 1533." 16 U.S.C. § 1537(b)(1). Surely this provision, mandating a leadership role for the United States in species preservation worldwide, does not contradict but rather reinforces an intent to have the federal government's own agencies promote the Act's requirements abroad.

The structure of the statute also demonstrates that the various sections of the Act were designed to overlap and to be interpreted *in pari materia* with them, *i.e.*:

Section 6, 16 U.S.C. § 1535, Cooperation With States

Section 7, 16 U.S.C. § 1536, Interagency Cooperation

Section 8, 16 U.S.C. § 1537, International Cooperation

With such statutory structure, it is inconceivable that the Secretary would argue that, because there is a separate section of the Act dealing with federal "Cooperation With States," the Section 7 consultation requirement should not apply to federal agency action occurring in a state. Yet the Secretary makes that very argument with respect to agency relationship on wildlife issues in foreign nations (Pet. Br., p. 37). This argument ignores Congressional intent, which is plainly illustrated by the structure of the Act, that Section 8 should not preclude application of Section 7 to foreign actions. Hence, the statutory text and the very structure of the Act express a clear intent that Section 7 apply to activities in foreign nations.

B. The Legislative History Confirms That Congress Intended the Endangered Species Act to Apply to Federally Funded or Authorized Action Abroad

The antecedents from which the Endangered Species Act arose are replete with international objectives. It is not surprising, therefore, that the present Act has a pervasive international cast. In fact, the earliest legislation in the United States designed specifically to protect and preserve endangered or threatened species was prompted

by the First World Conference on National Parks held in 1962. After the World Conference, the Secretary of the Interior, Stewart Udall, proposed the Endangered Species Preservation Act, Pub. L. No. 89-669, 80 Stat. 926 (1966), which he described as a "fresh and assertive effort to authorize Federal participation in the national and *international* programs to preserve our . . . wildlife heritage." 1966 *U.S. Code Cong. & Ad. News* 3342, 3344 (emphasis added).[8]

In 1969, Congress passed the Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (1969), which authorized the Secretary of the Interior to protect animals threatened with worldwide extinction[9] by banning their import into the United States and barring the sale of domestically endangered species taken in violation of law. The Senate report described the purpose of the Act's international tone as "insur[ance] that the United States does not contribute to the extirpation of other nations' wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 1, 2 (1973), *reprinted in* 1973 *U.S. Code Cong. & Ad. News* 2989.

Shortly after the enactment of the Endangered Species Conservation Act, the Secretary promulgated a list of endangered fish and wildlife, compiled from data supplied by international conservation organizations. The list, which designated the location of the endangered species' natural habitat, included animals from all over the

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[8] The legislative history of the Act indicates that "[c]ertain features of the bill involve conservation treaties between the United States and other countries . . . [and] pursue[] our obligations under the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 1940." 1966 *U.S. Code Cong. & Ad. News* 3342, 3356.

[9] In signing the Endangered Species Conservation Act into law, President Richard Nixon commented: "I am signing into law the most significant action this Nation has ever taken in an international effort to preserve the world's wildlife." *Public Papers of the Presidents*, Richard Nixon, 1969 "Statement on Signing the Wildlife Bill," p. 995.

world.[10] It is evident from a review of the very first endangered species list that the United States has historically been committed to protecting endangered species dwelling beyond its borders, not just protecting those within its borders. Thus, the Endangered Species Act reflects the fact that the United States has assumed responsibility as a leader in the international community for endangered species conservation.[11]

While the 1966 and 1969 endangered species legislation did not contain consultation provisions approaching the breadth of Section 7(a)(2) of the current Act, the legislative history provides no directive that the consultation duty present in the earlier versions of the statute was to be limited exclusively to domestic actions. Both statutes do, however, provide a clear directive that the Acts were to be worldwide in their scope.

The legislative history of 1973's Endangered Species Act and its subsequent amendments further demonstrate that Congress intended to continue the international scope of previous wildlife legislation by requiring the consultation procedure of Section 7(a)(2) to apply to *all* agency actions, domestic and foreign.

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[10] For example, the list of endangered species catalogued animals which are found exclusively in countries abroad, but also indicated that certain animals either migrate between, or occur within, the U.S. and one or more foreign countries. Examples include the masked bobwhite quail, the American peregrine falcon, the brown pelican, the thick-billed parrot, the ivory-billed woodpecker, and many others. When an animal migrates during the year between different countries or its natural habitat crosses international boundaries, it is absurd to view efforts to preserve it as solely a domestic matter.

[11] The legislative history of the Endangered Species Preservation Act indicated the role which the United States plays in setting the pace for the international effort to preserve and protect wildlife: "Many of the emerging nations . . . look to us for guidance and example in natural resource husbandry." 1966 *U.S. Code Cong. & Ad. News* 3342, 3343.

During House debate on the 1973 Endangered Species Act, Representative Dingell explained the significance of Section 7:

> Another important step we have taken in this bill . . . is that we have substantially amplified the obligations of both agencies [Interior and Commerce], and other agencies of Government as well, to take steps within their power to carry out the purposes of this Act.

119 Cong. Rec. 42,913 (1973) (statement of Rep. Dingell). Representative Dingell illustrated this statement with two examples. The first dealt with a threat to the whooping crane caused by the Air Force bombing activities near its wintering grounds on the Texas coast. As indicated earlier, the endangered species list includes the whooping crane and denotes its natural habitat as the United States *and* Canada.

Representative Dingell continued by noting "[a]nother example has recently crossed my desk, having to do with the *continental* population of grizzly bears which may or may not be endangered but which is surely threatened." *Id.* (emphasis added). Representative Dingell illustrated the problem with reference to a *Field & Stream* article which discussed the "*North American* grizzly bear." [12] *Id.* It is not simply a coincidence that Representative Dingell illustrated his comments with animals whose domain is not exclusively in the United States; such examples demonstrate that Congress intended the duties associated with Section 7 to apply in an international context. [13]

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[12] The placement and content of this discussion in the legislative history make it evident that Representative Dingell was addressing the implications of the Section 7 consultation process.

[13] The government attempts to dismiss this portion of the legislative history by pointing to the fact that the report illustrated its point with a reference to the grizzly bears in Yellowstone Park (Pet. Br., p. 43). This example is purely anecdotal and in no way limits the scope of Section 7.

In discussing the parameters of Section 7, the House report stated "[t]his subsection requires . . . agencies to use their authorities in order to carry out programs for the protection of endangered species, . . . take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat. . . ." H.R. Rep. No. 412, 93d Cong., 1st Sess. 1, 14 (1973). At the time the above statement was made, the endangered species list included numerous animals which were found only in foreign countries, yet the report does not distinguish between endangered species found in the United States and endangered species found abroad; the report simply states that "agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species." [14] *Id.* Since endangered species included species from all over the world at the time the statement was prepared, it is evident that Congress intended the Section 7 process to

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[14] The Secretary argues (Pet. Br., p. 2) that he has consistently taken the position that his responsibilities under Section 7(a)(2) to designate the critical habitat of listed species do not apply to habitat in foreign countries and that this practice logically extends to his consultation duties. *Amici* note that the designation of critical habitat is not an issue here. Moreover, though the government contends that it would be illogical to give different geographic scope to the critical habitat and "jeopardy" requirements of Section 7, it should be noted that the government elsewhere has recently acknowledged that critical habitat designation provides little, if any, protection beyond that already provided by the "jeopardy" duty. *See* 56 Fed. Reg. 19,812 (1991) ("[i]n practice, the threshold required to make a finding of 'jeopardy' or 'destruction or adverse modification of critical habitat' are identical"). *See also*, M. Bean, *The Evolution of National Wildlife Law* (2d ed. 1983) at 359 ("any action that adversely modifies the critical habitat of any listed species must also jeopardize its continued existence"). Thus, even if the government is correct that the critical habitat provisions of Section 7 do not apply abroad, a point we do not concede, that fact does not result in diminished Section 7 protection for species outside our borders.

include actions which jeopardized endangered species abroad as well as in the United States.

During the floor debates prior to the approval of the House version, Representative Grover stated:

> [The bill] will permit administrative, economic, and legal actions designed to increase the population levels of these affected species *wherever they may live* and restore them to a meaningful role in their and our environment.

119 Cong. Rec. 30,165 (statement of Rep. Grover). Representative Grover's phrase "wherever they may live" illustrates Congressional intent that the Act apply to federally funded or approved activities the effects of which will be on foreign soil.

In *TVA v. Hill*, the Supreme Court addressed the original intent of the Endangered Species Act:

> The dominant theme pervading all Congressional discussion on the proposed [Endangered Species Act of 1973] was the overriding need *to devote whatever effort and resources were necessary* to avoid further diminution of national and *worldwide wildlife resources* . . . . The legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species.

TVA v. Hill, 437 U.S. at 177 (emphasis in original). This Court recognized Congress' awareness of the global nature of the endangered species problem and its resolve that the actions of U.S. government agencies should not further contribute to it:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally *every section* of the statute . . . . In addition, the legislative history undergirding § 7 reveals *an explicit congressional decision to require agencies to*

> *afford first priority to the declared national policy of saving endangered species.* The pointed omission of the type of qualifying language previously included in endangered species legislation *reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.*

Id. at 184-85 (emphasis added).

The Secretary's limiting interpretation of Section 7 directly challenges the "conscious decision" of Congress, as interpreted by the Supreme Court. If species protection is to *take precedence over* the "primary missions" of federal agencies, such precedence must extend whether an agency's "mission" is carried out within the United States or abroad. Indeed, this Court has stated that, pursuant to Congressional intent evinced in the Act, whatever effort and resources were required to "avoid further diminution of national and *worldwide wildlife resources*" should be expended. *TVA v. Hill*, 437 at 177. The Secretary, in contrast, is essentially arguing that for those agencies that have "primary missions" abroad, the Section 7 consultation process does not apply. The argument has no more merit today than it did in 1978, when this Court rejected much the same argument in *Hill*.

C. Subsequent Administrative and Legislative Actions Are Consistent With the Application of Section 7 to Federal Actions Abroad

Following the Act's adoption in 1973, the Secretary began an interagency consultation and rulemaking procedure in order to implement its mandates. Proposed rules were published in 1977, applying Section 7's consultation requirements to agency actions likely to affect endangered species both within the United States and abroad. 42 Fed. Reg. 4868 (1977).[15] This position was

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[15] These proposed rules explicitly stated that Section 7 applied to U.S. agency actions taking place in other nations:

supported by the Council on Environmental Quality, the General Counsel's Office of the National Oceanic and Atmospheric Administration [16] and the Interior Department Solicitor's Office.[17] Other agencies, including the State and Defense Departments as well as the Army Corps of Engineers, opposed the application of Section 7 (a)(2) abroad. Upon considering the agency positions on both sides of the issue, the Secretary published final rules on January 4, 1978 codifying the extraterritorial application of Section 7. 43 Fed. Reg. 870, 873-74 (1978).

While the Secretary argues (Pet. Br., pp. 45-49) that, absent evidence of contrary Congressional intent, there is a presumption against extraterritorial application of statutes, the legislative history previously discussed and the subsequent legislative action outlined below provide a clear indication that Congress favors protecting *all* endangered species wherever they may reside. The presumption against extraterritoriality cannot overcome the plainly written requirements of the Endangered Species Act that *all* endangered and threatened species receive protection under Section 7.

> [Section 7] requires every Federal Agency to insure that its activities and programs in the United States, upon the high seas, and *in foreign countries* will not jeopardize the continued existence of a listed species.

42 Fed. Reg. at 4871 (emphasis added).

[16] The views of the National Oceanic and Atmospheric Administration are particularly important, since it is through that agency that the Secretary of Commerce carries out his duties under the Endangered Species Act, duties that are parallel with those of the Secretary of Interior. See the Act's definition of "Secretary" at 16 U.S.C. § 1532(14).

[17] The Interior Department Solicitor's Office commented: "[W]e believe the U.S. Fish and Wildlife Service's position is correct and conclude that the jeopardy clause applies to federal activities in foreign countries." Memorandum from Associate Solicitor, Conservation and Wildlife to Director, Fish and Wildlife Service (April 12, 1977).

In subsequent amendments to the Endangered Species Act, in 1978, 1979, and 1982, Congress reviewed the regulations requiring that Section 7 apply to actions abroad, and approved them. The 1978 amendment reorganized the Act, creating a new Section 7(a) which restated the original Section 7 consultation requirements and their 1978 interpretation. The Conference Report to these amendments explicitly approved the existing (extraterritorial) policy regarding agency consultation:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species . . . . The Conferees felt that the Senate provision *by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies* and have received substantial judicial interpretation.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 17, 18 (1978), *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 9484, 9485 (emphasis added). This language constitutes the conference committee's "stamp of approval" of the worldwide scope of Section 7, and that, coupled with the international concerns expressed throughout the Act, makes it clear that Congress intended that Section 7 apply to all actions, including those by U.S. agencies operating in foreign countries. This comports with the longstanding view of this Court that when Congress reenacts a statute, administrative regulations interpretating that statute's provisions are considered adopted by Congress and have the force of law. *United States v. Zazove*, 334 U.S. 602, 623 (1948); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938).[18]

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[18] Amending the Act in 1982, Congress again retained the existing language and extraterritorial interpretation of Section 7. The legislative history maintains that Section 7 did not result in "inordinate burdens upon Federal agencies . . . . In fact, the consultation provisions have functioned extremely well . . . ." H.R. Rep. No. 567, 98th Cong., 1st Sess. 1, 10, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* 2807, 2813.

In 1983, the Secretary proposed revisions to the 1978 rule to eliminate agency actions in foreign nations from Section 7(a)(2)'s consultation requirements. 48 Fed. Reg. 29,990 (1983). Instead of the reasoned explanation required for such an abrupt policy shift,[19] the Secretary merely stated that recision was justified by the Act's apparent domestic orientation and its potential to interfere with the sovereignty of foreign nations.[20] *Id.*

Congress expressed outrage at the evident attempt on the part of the Secretary to ignore the intent and purpose of the Act and categorically rejected such an alteration. Congressional reaction to the Secretary's 1983 proposed rule change demonstrates that Congress viewed the Secretary's new interpretation as a betrayal of the legislative intent behind Section 7(a)(2). The House Appropriations Committee, considering the 1987 funding requests of the Interior Department stated: "[T]he Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance." H.R. Rep. No. 714, 99th Cong., 2d Sess. at 19 (1986).

An even stronger reaction was voiced by the Senate Environment and Public Works Committee in its report on the 1987 amendments to the Act:

> An additional area of concern with current implementation of the Act relates to the regulations promulgated by the Secretary on June 3, 198€, which appear intended to limit the recovery and protection of the species under section 7 of the Act. To the extent that these regulations attempt to restrict the

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[19] "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicles Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 41 (1983).

[20] The revised rule was published as final on June 3, 1986. 51 Fed. Reg. 19,926 (1986).

> Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, *the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.*

S. Rep. No. 240, 100th Cong., 2d Sess. 1, 6-7 (1988), *reprinted in* 1988 *U.S. Code Cong. & Ad. News* 2700, 2705 (emphasis added). Furthermore, Senator John Chaffee, the floor manager of the 1978 amendments, summarized Congress' reaction to the Secretary's rule in a speech on the Senate floor:

> Congress is not in any way ratifying or approving that recision of the regulations. With or without those specific regulations, the law is clear. *It [Section 7(a)(2)] applies to federal agencies that are operating within or outside of the United States. Any other interpretation is intolerable and I believe illegal.*

134 Cong. Rec. S9758 (daily ed. July 25, 1988) (emphasis added).

The judiciary, as the final authority on issues of statutory construction, must reject administrative interpretations which are contrary to clear Congressional intent. *Chevron*, 467 U.S. at 843 n.9. Congress, in the plain language of the Act and in the legislative history surrounding it, has consistently made its intent clear that Section 7(a)(2)'s consultation requirements apply to agency actions abroad.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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ADDENDUM

[SEAL]

UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the General Counsel
Washington, D.C. 20250-1400

August 8, 1991

Mr. Michael J. Bean
Senior Attorney
Environmental Defense Fund
1616 P Street, N.W.
Washington, D.C. 20036

Dear Mr. Bean:

This is in further response to your letter of May 21, 1991, concerning our Animal and Plant Health Inspection Service's (APHIS) Guatemala MOSCAMED Program. We regret the delay in responding.

We recognize your concern about the effect of the MOSCAMED Program on the golden-cheeked wood warbler in Guatemala. However, we are of the view that section 7 of the Endangered Species Act does not require the Department of Agriculture (USDA) to consult with the Department of the Interior (DOI) regarding its activities in Guatemala. The DOI has promulgated a regulation that states that a Federal agency's duty to consult is limited to activities conducted in the United States or on the high seas. Although this regulation has been successfully challenged in Federal court and is currently under review by the United States Supreme Court, the lower courts' decisions have been stayed pending the decision by the Supreme Court. Thus, the DOI regulation remains in effect and the USDA is in full compliance with the law.

APHIS published a draft Environmental Analysis (EA) in 1989. It then carefully considered all comments

received during a 60-day comment period and published a final EA in May 1991. An assessment of the effect of the MOSCAMED Program on the golden-cheeked wood warbler appears in appendix 8 of the final version of the document. APHIS concluded in the EA that the Program will have no effect on the warbler in Guatemala. The final EA and a packet of information containing APHIS' Record of Decision and news releases announcing the completion of the document were mailed to you on July 1.

APHIS is committed to complying with the applicable environmental laws. Thus, APHIS will consider any evidence the Environmental Defense Fund (EDF) is able to produce, independent of the information contained in the APHIS and Agency for International Development studies, that shows that the golden-cheeked wood warbler inhabits the specific areas of Guatemala to be sprayed under the MOSCAMED Program or that supports any of the claims the EDF has made concerning harm to the golden-cheeked wood warbler, concerning harm to other migrating insectivorous birds, or concerning any other adverse impacts that the EDF believes may result from the spraying program.

Sincerely,

/s/ Alan Charles Raul
ALAN CHARLES RAUL
General Counsel